IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.V.K.BALI
&
THE HONOURABLE MR. JUSTICE M.RAMACHANDRAN

TUESDAY, THE 23RD JANUARY, 2007 /3RD MAGHA, 1928

WA.No. 2245 of 2006 (E)

(AGAINST THE JUDGEMENT IN WPC.30184/2006 Dated 16/11/2006)
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APPELLANT/PETITIONER:

MESSRS GRAMOX PAPER AND BOARDS LTD.,
PUTHUPADY P.O., MUVATTUPUZHA, REPRESENTED BY ITS DIRECTOR.

BY ADV. SRI.V.GIRI

RESPONDENTS/RESPONDENTS:
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1. STATE OF KERALA,
REPRESENTED BY THE PRINCIPAL SECRETARY TO GOVERNMENT, POWER DEPARTMENT, GOVT. OF KERALA, SECRETARIAT, THIRUVANANTHAPURAM.

2. KERALA STATE ELECTRICITY BOARD,
REPRESENTED BY ITS SECRETARY, KERALA STATE ELECTRICITY BOARD, VYDHYUTHI BHAVANAM, PATTOM PALACE P.O., THIRUVANANTHAPURAM.

3. SPECIAL OFFICER (REVENUE),
KERALA STATE ELECTRICITY BOARD, VYDHYUTHI BHAVANAM PATTOM, THIRUVANANTHAPURAM.

R1 BY SR.GOVERNMENT PLEADER SRI.M.R.SABU.
R2 & R3 BY SRI.C.K.KARUNAKARAN, SC FOR KSEB.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 09/01/2007, THE COURT ON 23/01/2007 DELIVERED THE FOLLOWING:

V.K.BALI,C.J. & M. RAMACHANDRAN, J.

W.A. No. 2245 of 2006 - E

Dated this the 23rd day of January, 2007

J U D G M E N T

M.Ramachandran,J:

The Special Officer (Revenue) of the Kerala State Electricity Board had passed an order on 10.10.2006 whereby the appellant/petitioner, a small scale industrial unit enjoying the status of a high tension consumer of electricity was to pay the arrears of electricity charges amounting to Rs.84,83,938/-, in respect of electrical energy consumed by them from February 1999 to October 2000. In connection with the demand, an earlier original petition had been filed as O.P.No.12735 of 2000. The execution of the demand had been stayed at that time. The contention raised was that in respect of the additional load sanctioned to them, they were entitled to a concessional tariff, in extension of the earlier privilege enjoyed by them. The court, later on, had disposed of the original petition on 25.5.2006 directing the Board to take a fresh decision on the appeal petition, taking note of the relevant orders as

also the judgment reported in **Cochin Cements Ltd.** v. **Kerala State Electricity Board** (2005(3) KLT 417).

2. The consumer had been given a personal hearing and the views of the Board had been presented by the Senior Superintendent of the Kerala State Electricity Board. Adjudicating authority held that there was no case made out for extending concession on the additional load sanctioned. The finding was that he was not eligible for Pre-92 tariff benefits especially in view of the Board's order dated 16.12.1999 in which it is stated that the additional power allocation to the industries enjoying Pre-92 tariff were to be granted on specific condition that the industries were to segregate the existing load eligible for the said benefit from the additional load. The tariff applicable for additional load after 1.1.1997 was to be the ruling tariff.

3. Resultant position was that since the existing load at the time of grant of Pre-92 tariff benefit was 400 KVA, the consumer was eligible for Pre-92 tariff to the extent of 400 KVA only and was liable to remit at ruling

rate in respect of the additional load of 600 KVA and its proportionate consumption, from the date of enhancement of contract demand viz., from 15.2.1999.

4. The learned Judge had refused to interfere in the matter, observing that the view taken cannot be said to be arbitrary or irrational. Reference was also made by the learned Judge to Ext.P5 dated 16.12.1999 in which it is stated that additional capacity put into commercial production after 1.1.97 is not eligible for any concession. It had been noticed that the concessional tariff was extended to the new industrial units at substantial cost to public exchequer and a new unit which might have come in line on or after 1.1.1997 may not be able to claim advantage. The additional capacity put to commercial production after 1.1.1997 also was not to be allowed to claim benefit. Therefore, according to the learned Judge, the stand taken by the impugned order (Ext.P6) appeared to be a plausible and reasonable view, as Board had rights to restrict the privilege.

5. This appeal has been filed against the above judgment. Sri.Giri appearing for the appellant submits that the reasoning of the learned Judge was not sustainable. The observation that there was no irrationality or arbitrariness, according to him, was without justification and omitting to appreciate the full facts. Ext.P5 order, relied on, had come to be issued long after the appellant had been permitted to use additional capacity and it could not have governed the parties. The observation of the learned Judge that the benefits were to be extended to the appellant/petitioner at substantial cost to the public exchequer also was a finding without material and it was not a case pleaded by the Board. The benefits offered were not permissible to be cut away, especially on principles of estoppel.

6. It is admitted by the parties that all the relevant orders on the subject have been presented so that the matter could be considered from all relevant angles. Two documents which were not available at the time of consideration of the writ petition have been filed

along with the writ appeal as Annexures 1 and II.

7. We had opportunity to hear Sri.C.K.Karunakaran who submits that since the writ petition had been disposed of at the time of admission, there was no opportunity for filing the counter affidavit and even as of now, no counter affidavit has been filed, so as to explain the stand of the Board vis-a-vis the claim. However, since the relevant documents had been made available and we had the assistance of the counsel to examine the issue agitated, we do not think, there was requirement for a formal sworn statement in addition to the materials which had been placed before us.

8. During 1991-92, the Government of Kerala had introduced certain inducements to invite and attract industries to the State. Offer was that concessional power tariff/electricity duty would be admissible to the industries as a matter of incentive. Exts.P7 and P8 are the relevant orders which show that there will be a tariff concession applicable to such units which started commercial production between 23.9.91 and 31.12.96.

For receiving the advantage of a new industrial concern, it was a condition that the unit should have started commercial production between 1.1.92 and 31.12.1996. The benefit was extended also to existing units for substantial expansion/modernisation/diversification, but about which we are not concerned. The units were to be exempted for five years from payment of enhanced power tariff which came into effect from 1.1.1992.

9. Annexure-I shows that the unit of the appellant/petitioner has been extended power allocation to the extent of 700 KVA at 11 KV for their factory at Puthupady. Certain routine conditions were attached. Proceedings of the Financial Adviser and Chief Accounts Officer, K.S.E.B dated 1.7.1995 (Ext.P1) show that incentive of concessional rate of tariff at the request of the petitioner had been extended to them as they satisfied the pre-conditions. Company had started the commercial production on 30.3.1995. The proceedings indicate that the company was recognised as eligible for concession of power tariff for a period of five years from

30-3-1995 to 29-3-2000. The case of the appellant was that they were in need of the full extent of power which had been allocated to them as early as on 6.12.1994 by Annexure I viz., 700 KVA. Ext.P4 representation which of course had come to be filed in March, 2000, claimed that they were eligible for concessional tariff and there was no restraint possible as to the connected load, as was imposed.

10. Mr.Giri submits that the company's application dated 9.6.1993 was accepted and they were granted 700 KVA on 6.12.1994. In view of the delay in execution of work, they were initially permitted to avail of 400 KVA on 27.3.1995 and commercial production had started on 30.3.1995. This was an allotment as against the power allocated by Annexure-I. The trial run indicated that there was necessity for additional power and reference is made to the application made on 15.5.1995 for enhancing the contract demand to 650 KVA. On 28.7.1995, another request was made for enhancing the power allocation to 900 KVA. This was followed by

application for enhancement of power allocation to 1000 KVA.

11. It was only on 24.9.1998 that fresh allocation had come by Ext.P3. The existing allocation therefore shows as 400 KVA and additional allocation shown was 600 KVA making a total of 1000 KVA as admissible to them. The submission of the learned counsel is that there was no restriction for such grant or any restrictive condition suggested. Of course, when Ext.P5 general order was issued on 16.12.1999, additional power allocation had been considered as receivable by an applicant only on agreeing for fresh conditions. This, according to the counsel, is very crucial circumstance, when the plea of the appellant for concessional tariff is examined. Ext.P5, for the first time laid down that it should be on specific conditions alone and industries were to segregate the existing load eligible for Pre-92 tariff from the additional load. The officers were further directed to keep back allocation till such time agreements were specifically entered into by the

consumer and until segregation and metering was carried out power was to be withheld.

12. This order do indicate that “the tariff applicable for the additional load put into commercial production from 1.1.1997 in all the above cases shall be the ruling tariff”. Pre-92 tariff was not applicable in such cases. The argument of learned counsel for the appellant is that Ext.P5 would not have been applicable at all to their institution. The order started by laying down that “*Additional power to the HT/deemed HT/EHT industries enjoying Pre-92 tariff shall be granted on the specific condition that the industries shall segregate the existing load*”. Our attention is invited to Annexure-I where there is already power allocation to the unit to the extent of 700 KVA. Mr.Giri submits that full allocation could not be extended to them in spite of their demands and the delay ought not have jeopardised their interest. It was not a case where 'additional load' sanctioned, and only to such cases as coming within the purview of Ext.P5, the restriction was to operate.

13. Mr.Karunakaran however submits that the claim as above came only as an afterthought, and when additional allocation was accepted, it was done without putting up demand for any concessional tariff. Therefore, the claim totally is belated as well as misconceived. We find that the legal aspect as put forth, however, has not been considered by the Board while passing Ext.P6 order. The learned Judge also had overlooked the above. When guildelines of the tariffs were governed by the contract and regulatory orders issued from time to time, the conditions as agreed to between the parties are to be strictly enforced. This is especially borne in mind by an authority coming under the purview of Article 12 of the Constitution of India. Sufficient indication is there to show that there was demand for higher allocation in respect of a unit which had commenced operation and failure was on the part of the Board to supply such required energy already earmarked to be allocated. The groups in comparison therefore appear to be different

and distinct. To deny the appellant benefits may therefore amount to discrimination, as suggested by the counsel, from comparable units when they deserved to be bracketted.

14. Annexure II order dated 26.2.1997 also indicates that the existing contract demand of the unit was 700 KVA and additional allocation of 200 KVA had been granted on that date. From 26.2.1997 onwards, the unit was enjoying 900 KVA which was enhanced to 1000 KVA later on, but in respect of consumption up to 700 KVA, at least the appellant should have been charged only at Pre-92 tariff. The delay as suggested in the appellant putting forward the claims therefore is to be considered as material or relevant.

15. Of course, Mr.Karunakaran submits that what was being extended was only a concession, and since Annexure II had come to existence only on 26.2.1997 and well after 31.12.1996 the cut off date, the issue of concession does not arise. But, we have to bear in mind

that this was not due to any of the lapses of the industrialist. Simultaneously, we are of the view that since the initial allocation was only 700 KVA, additional allocation in excess thereof made available on 26.2.1997 would not have become qualified for concessional tariff.

16. Mr.Karunakaran submits that there was revision in 1992, and further revision thereafter, and if at all the concession was to be there only in respect of tariff resulting for 1992 revision. The Board was not obliged to continue the concession indefinitely. But, we have to see that as of right, because of Exts.P1 and P2, the appellant was to get the benefits normally up to 29.3.2000.

17. In the aforesaid circumstances, we hold that the appellant/petitioner will be entitled to get the benefit of Pre-92 tariff rates in respect of and up to additional load of 700 KVA, till 29.3.2000, and the extended date which had been granted by separate proceedings (214 days). The revenue has to be collected by segregating

the consumption on the basis of the above declaration. Ext.P6 and other demands will have to be appropriately re-worded, so as to extend the benefits as above as found admissible to the appellants. Consequently, the judgment of the learned single Judge is set aside. The writ appeal will stand allowed to the above extent. The parties will have to bear their respective costs.

V.K.Bali
Chief Justice

M. Ramachandran
Judge

Mbs/